85-1993

No. _____

Supreme Court, U.S.
FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1985

JOEL D. JACKSON,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

PETITION FOR WRIT OF CERTIORARI

DANIEL E. MONNAT, Counsel for Petitioner
MONNAT & SPURRIER
321 E. William, Suite 603
Wichita, Kansas 67202
(316) 264-2800

May, 1986

COPY

QUESTIONS PRESENTED

1. Was the Petitioner denied Equal Protection of the laws when, in a jurisdiction allowing the defense of diminished capacity, he was denied a jury instruction explaining the effect of mental disease or defect on his ability to form the specific intents required of the crimes charged while a voluntarily intoxicated defendant was, under that jurisdiction's decisional law, guaranteed an instruction explaining the effect of intoxication on those same specific intent elements?

2. Was the petitioner denied Due Process under the Fourteenth Amendment to the United States Constitution, as interpreted by this Court in *Sandstrom v. Montana* and *Connecticut v. Johnson*, when the trial court gave the jury a "presumption of intent" instruction which the Supreme Court of Kansas admitted "did not specifically instruct the jury that the burden of proof never shifts to the defendant" and which was combined with an epilepsy instruction which could have been taken by the jury to create a conclusive presumption of intent unless it found the Defendant to be in the "throes of an epileptic seizure at the precise time of the commission of the crimes"?

3. Was the defendant denied equal protection, due process of law and a fair trial by the Kansas Supreme Court's refusal to remand where defendant's defense of diminished capacity was not specifically or fairly presented in the trial court's instructions to the jury?

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

(A) The question of whether a state, consistent with the equal protection clause of the Fourteenth Amendment, may require that the jury be instructed as to the use of evidence of voluntary intoxication to negate a specific intent element of a crime but, at the same time, may refuse to allow a jury to be instructed as to the use of evidence of mental disease or defect not amounting to insanity to similarly negate a specific intent, is an important question of federal law which has not been, but should be, decided by this Court. 6

(B) The decision of the court below, upholding a "presumption of intent" instruction despite that court's acknowledgment that the instruction did not clearly state that the burden of proof never shifts to the defendant, is in conflict with this Court's decisions in *Sandstrom v. Montana* and *Connecticut v. Johnson*. 10

(C) The question of whether the defendant was denied equal protection, due process of law and a fair trial by the Kansas Supreme Court's refusal to remand where defendant's defense of diminished capacity was not specifically or fairly presented in the trial court's instructions to the jury is an important question of federal law which has not been, but should be, settled by this Court. 15

Conclusion 17

Appendices —

A. Syllabus by the Court A-1
B. Rehearing Denied B-1
C. Journal Entry of Trial C-1
D. Journal Entry of Judgment D-1
E. Instruction E-1
F. Motion for New Trial F-1

Table of Authorities

CASES

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) 13

Cleburne Living Center v. City of Cleburne, TX, 726 F.2d 191 (5th Cir. 1984) 10

Connecticut v. Johnson, 460 U.S. 73, 74 L.Ed.2d 823, 103 S.Ct. 969 (1983) 5, 12, 13, 14

Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970) 8

J.W. v. City of Tacoma, WA, 720 F.2d 1126 (9th Cir. 1983) 10

McGowan v. Marvland, 366 U.S. 420, 6 L.Ed.2d 393,
81 S.Ct. 1101 (1961) 8

Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39,
99 S.Ct. 2450 (1979) 5, 6, 10, 11, 13, 14

Shelley v. Kraemer, 334 U.S. 1, 685 S. Ct. 836,
92 L.Ed. 1161 (1948) 9

State v. Caldrone, 202 Kan. 651,
451 P.2d 205 (1969) 16

State v. Dargatz, 228 Kan. 322,
614 P.2d 430 (1980) 5, 15

State v. Grauerholz, 232 Kan. 221,
654 P.2d 395 (1982) 5, 7, 15

State v. Johnson, 233 Kan. 981,
666 P.2d 706 (1983) 12

State v. McDaniel & Owens, 228 Kan. 172,
612 P.2d 1231 (1980) 15

State v. Miesbauer, 232 Kan. 291,
654 P.2d 934 (1982) 7

State v. Neal, 215 Kan. 737, 529 P.2d 114 (1974) 16

State v. Osburn, 211 Kan. 248,
505 P.2d 742 (1973) 15

State v. Sterling, 235 Kan. 526,
680 P.2d 301 (1984) 7

State v. Topham, 231 Kan. 167,
642 P.2d 986 (1982) 5

State v. Turnstall, 8 Kan.App.2d 76,
651 P.2d 19 (1982) 16

State v. Werner, 8 Kan.App.2d 364,
657 P.2d 1136 (1983) 16

State v. Whitehead, 226 Kan. 719,
602 P.2d 1263 (1979) 16

Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31,
97 S.Ct. 1459 (1977) 10

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 533,
6 S.Ct. 1064 (1886) 10

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States —
Amendment XIV 2, 6, 8

United States Code
28 U.S.C. §1257(3) 2

Kansas Statutes Annotated—
Section 21-3208 .....2, 9

TREATISES AND ARTICLES

Lewin, "Psychiatric Evidence in Criminal Cases
for Purposes Other than the Defense of
Insanity", Syracuse L. Rev., Vol. 26 (1975) 7

Tribe, *American Constitutional Law*
(Foundation Press, 1978) 8

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

JOEL D. JACKSON,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Kansas Supreme Court, 238 Kan. 793, 714 P.2d 1368 (1986), appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Kansas was filed February 21, 1986. A timely motion for rehearing was

denied by order of the Supreme Court of Kansas, dated April 3, 1986. This petition for certiorari was filed within 60 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

Fourteenth Amendment:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute

Kansas Statutes Annotated, 21-3208(2):

> (2) An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

STATEMENT OF THE CASE

This case involves the attempted premeditated murder and aggravated kidnapping convictions of Joel Jackson, a twenty-year-old brain-damaged male with a long psychiatric

history, including seizures, blackouts and suicide attempts. These convictions were his first offenses and his first known involvement in violence. He was sentenced to consecutive sentences of life imprisonment and fifteen years to life imprisonment.

The case arose out of an incident which occurred at Sunflower Farms, a horse ranch located in Wichita, Kansas. The petitioner's family boarded show horses there. The victim, Denise Picard, worked at Sunflower Farms and resided in a one-room apartment built inside the barn. On April 20, 1984, Ms. Picard was stabbed several times with a knife by the petitioner. Ms. Picard recovered from the wounds inflicted by the "rather dull" knife and the petitioner was charged with the aforesaid crimes.

Denise Picard testified at trial that she and the petitioner had an argument the morning of April 20, 1984, that the petitioner left Sunflower Farms, returned in the middle of the afternoon, followed Ms. Picard around the inside of the barn for a few minutes, grabbed her from behind, without provocation, and began stabbing her. She testified that during the prolonged struggle, the petitioner opened the trunk of his car outside the barn and attempted, unsuccessfully, to put her inside.

The petitioner testified at trial that when he went back to the barn in the afternoon, Ms. Picard sexually propositioned him and began touching his genitals. When the petitioner rebuffed Ms. Picard's advances, she became angry and verbally abused the petitioner. The petitioner testified he turned and began to walk away when Ms. Picard hit him across the back with a pitchfork. The petitioner stated he then "blacked out" and remembers nothing until he was standing near the barn door with the bleeding Ms. Picard in a sitting position on the ground in front of him. Ms. Picard got to her feet and ran to a nearby retail store. The petitioner left the scene, went to his mother's house and later was surrendered to the police.

The petitioner raised the insanity defense. At trial, three clinical psychologists, including the one originally hired by the State for rebuttal, testified that the petitioner was legally insane under the M'Naughten test of insanity applied in the State of Kansas and likely suffered a dissociative episode at the time the crimes charged occurred. Additionally, counsel elicited from the psychologists certain testimony tending to negate the specific intent elements of the crimes charged. This evidence showed that the petitioner had brain damage from near birth which prevented the full development of his intellectual skills and would interfere with "long term planning . . . [and] strategies." The testimony also established that the twenty-year-old petitioner had been educated in special education classes throughout his limited academic career and, at the time of trial, could spell and read at only third and fourth grade levels. With this petitioner, "violent acts [were] much more likely to occur at the spur of the moment in a situation of frustration and anger in which there's a failure to control impulses." Finally, when asked if the petitioner premeditated or planned the alleged assault and kidnapping, one of the psychologists, Dr. Thomas Thorpe, stated: "Joel is one of the least likely people that I have encountered in a long time to do such a thing on a premeditated basis." Nonetheless, feeling itself constrained by Kansas Supreme Court precedent, the trial court refused to instruct the jury as to the manner in which the petitioner's mental defects may have affected his ability to form the specific intents required of the crimes charged.

At the time of the trial, much confusion surrounded the status in Kansas of the partial defense of diminished capacity which, in essence, allows evidence of a mental disease or defect not amounting to insanity to be admitted for the purpose of negating the specific intent required of a crime. Although the Kansas Supreme Court sanctioned the admission of such evi-

dence for such purposes, it nonetheless purported to reject the doctrine of diminished capacity. See *State v. Dargatz*, 228 Kan. 322, 614 P.2d 430 (1980); *State v. Topham*, 231 Kan. 167, 642 P.2d 986 (1982). That court had, two years prior to petitioner's trial, expressly rejected a defense request for a jury instruction on diminished capacity. *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982).

Counsel for the petitioner raised the diminished capacity issue by submitting a jury instruction on the same to the trial court, despite the fact that the trial court was bound by *Grauerholz* to reject it. See Appendix E. The issue was again raised on motion for new trial before the trial court. See Appendix F. The trial court was aware of its duty to reject the proffered instruction:

> Refusal to give diminished capacity instruction — which I don't remember but I'm assuming I refused to do that and I do remember refusing to give A.L.I.'s insanity defense — both of those will make new law if you convince the Supreme Court that that should be the law of Kansas. And I've forgotten, both of those have been ruled on by the Supreme Court in the past year and they've refused had [sic] to change the law in the state of Kansas.

(Hearing on motion for new trial).

On appeal, the diminished capacity issue was raised in the Brief of Appellant timely filed with the Kansas Supreme Court which led to the opinion attached hereto as Appendix A.

The second issue, also concerning a jury instruction, was likewise raised at the trial court level during arguments over jury instructions. The trial court's proposed instructions included a "presumption of intent" instruction of the kind dealt with by this Court in *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) and *Connecticut v. Johnson*, 460 U.S. 73, 74 L.Ed. 2d 823, 103 S.Ct. 969 (1983). It is the

petitioner's contention that the instruction given in the instant case failed to clearly instruct the jury that the presumption of intent does not shift the burden of proof to the Defendant. The issue was raised by defense counsel as follows:

> ***I still want to show the Defendant's objection to Instruction Number 6. . .
>
> I refer your Honor, the notes [to the Kansas pattern instruction on presumption of intent] were made in regard to I think it was the Sandstrom case — *Sandstrom vs. Montana* — where they held you couldn't shift the burden of proof.

(Transcript of trial proceedings).

The trial court overruled the petitioner's objection by subsequently including the instruction in its charge to the jury.

On appeal, the issue was preserved by inclusion in the Brief of Appellant timely filed with the Kansas Supreme Court which dealt with the merits of the matter in the opinion attached hereto as Appendix A.

REASONS FOR GRANTING THE WRIT

(A) The questions of whether a state, consistent with the equal protection clause of the Fourteenth Amendment, may require that the jury be instructed as to the use of evidence of voluntary intoxication to negate a specific intent element of a crime but, at the same time, may refuse to allow a jury to be instructed as to the use of evidence of mental disease or defect not amounting to insanity to similarly negate a specific intent, is an important question of federal law which has not been, but should be, decided by this Court.

The essence of the partial defense of diminished capacity, otherwise known as partial responsibility, is that "if because of

mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of a lower grade of the offense not requiring that particular mental element." Lewin, "Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity", Syracuse L.Rev., Vol. 26, p. 1055 (1975).

At the time of trial, Kansas courts allowed introduction of evidence of mental disease or defect for purpose of negating specific intent. The Kansas Supreme Court, however, purported to reject the doctrine of diminished capacity. As can be seen from the opinion of that court in the instant case (see Appendix A), the court acknowledged its previous contradictory position and recognized that Kansas has, all along, effectively allowed the partial defense of diminished capacity. The court however both refused to require a jury instruction on diminished capacity when fairly presented by the evidence and refused to reverse petitioner's convictions.

At the time of the petitioner's trial, Kansas courts flatly forbade the giving of a jury instruction on diminished capacity. *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982). However, a voluntarily intoxicated defendant was entitled to have the jury instructed as follows on the effect of voluntary intoxication on a specific intent crime:

> "Voluntary intoxication is not a defense to a criminal charge, but when a particular intent or other state of mind is a necessary element of the offense charged, intoxication may be taken into consideration in determining whether the accused was capable of forming the necessary intent or state of mind."

State v. Miesbauer, 232 Kan. 291, 298, 654 P.2d 934 (1982). Such an instruction is *required* where there is evidence to support it. *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984).

The Fourteenth Amendment to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." The constitutional guarantee of equal protection is implicated whenever the "government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles." Tribe, *American Constitutional Law*, p. 993 (Foundation Press, 1978).

In the instant case, a defendant who is voluntarily intoxicated and a defendant who suffers from a mental disease or defect are similarly situated with respect to the instruction under discussion. Whether by intoxication or by mental illness, both Defendants labor under mental disabilities which may result in the inability to form a required specific intent. Any distinction due to the manner in which that inability came about is, at least, irrelevent and, at most, more favorable to the latter Defendant who has arrived at that condition through no fault of his own, unlike the Defendant who is voluntarily intoxicated.

The standard most often adopted in equal protection cases is the "rational basis test" whereunder, as stated in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961):

> ***The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it...

366 U.S. at 425-6. See also *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970).

However, no rational basis can be advanced for the distinction created here. Plainly, it is at least as important that a jury be instructed as to the legal effect of evidence, psychological or otherwise, of mental disease or defect on a specific intent as it is to inform a jury of the effect of voluntary intoxication on that same issue. The absence of a diminished capacity instruction may prejudice a defendant, particularly where the insanity defense is also raised. If a jury concludes the psychological expert testimony and other facts in a particular case do not justify a finding of insanity, the jury uninstructed as to diminished capacity may well conclude that the expert testimony is not relevant to the remainder of the factual issues before them, including the existence of any required specific intent. A jury simply does not have the time or means to become as knowledgeable about the complex legal and factual issues present in such a case and being fully instructed is essential to a fair trial.

There is thus no legitimate state goal to be achieved by this distinction and, therefore, no rational basis for it. And none was advanced by the Kansas Supreme Court, as can readily be seen by reading the single sentence dealing with the substantive issue:

> The fact that we have required an instruction on voluntary intoxication is merely a response to the legislature's enactment of [Kan. Stat. Ann.] 21-3208(2) and an attempt to carry out the purpose of the statute . . . .

Appendix A.

This is no justification. Judicial action cannot be insulated from the reach of the equal protection clause simply because that action is taken to further some legislative end, *cf., Shelley v. Kraemer,* 334 U.S. 1, 685 S. Ct. 836, 92 L.Ed. 1161 (1948). It is the *State,* not any particular branch thereof, which is forbidden to create arbitrary distinctions.

The above shows the decision below fails even the minimal "rational basis" test. However, the petitioner contends the instant distinction drawn by the Kansas courts between those voluntarily intoxicated and those suffering a mental illness or defect, involves discrimination against a "suspect class" — mentally ill persons — and this case deserves a "heightened scrutiny" — a higher standard for the State to meet — just as such higher scrutiny is accorded to aliens (*Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 533 (1886)) and illegitimates (*Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977)). At least two federal circuit courts have determined that the class of mentally ill persons bears enough indicia of a suspect class to warrant "heightened" or "intermediate" scrutiny. *Cleburne Living Center v. City of Cleburne, TX*, 726 F.2d 191 (5th Cir. 1984); *J.W. v. City of Tacoma, WA*, 720 F.2d 1126 (9th Cir. 1983).

The petitioner, now a twenty-three-year-old man, is facing consecutive sentences of life and fifteen years to life on convictions which very well may have resulted from the jury's ignorance of the legal effect of evidence of mental disease or defect on the specific intent elements of the crimes charged. It is urged that this Court issue a Writ of Certiorari and reverse the decisions and judgments of the lower courts, whereupon the defendant may be retried before a properly instructed jury.

(B) The decision of the court below, upholding a "presumption of intent" instruction despite that court's acknowledgment that the instruction did not clearly state that the burden of proof never shifts to the defendant, is in conflict with this Court's decisions in *Sandstrom v. Montana* and *Connecticut v. Johnson*.

Instruction No. 6 given to the jury by the trial court reads as follows:

> Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant.
>
> If you find that Mr. Jackson was in the throes of an epileptic seizure at the precise time of the commission of the crimes and that the seizure rendered his actions unintentional and involuntary, you must find him not guilty of all charges and their lesser included offenses.

(R. Vol. I 21).

The first paragraph of this instruction is a truncated version of revised P.I.K. [Pattern Instructions for Kansas] 2d Crim. 54.01 which reads as follows:

> Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant.

The second paragraph of instruction No. 6 arose out of testimony that the petitioner may suffer from an unconfirmed case of temporal lobe epilepsy.

In *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), this Court held that the instruction "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the Fourteenth Amendment's requirement that the State prove every element of a crime beyond a reasonable doubt because it may have been interpreted by the jury as having created either a conclusive presumption or a burden-shifting presumption. 442 U.S. at 524.

In *State v. Johnson*, 233 Kan. 981, 666 P.2d 706 (1983), the Kansas Supreme Court correctly interpreted this Court's pronouncements in *Sandstrom* and *Connecticut v. Johnson*, 460 U.S. 73, 74 L.Ed.2d 845, 103 S.Ct. 969 (1983), as follows:

> ***It has long been recognized that any instruction which shifts the burden of proof or of persuasion to the defendant is unconstitutional and is clearly erroneous. It appears that under *Sandstrom any instruction which might reasonably be construed by the jury as shifting the burden of proof to the defendant is also unconstitutional.*
>
> ***
>
> ***under the pronouncements of *Sandstrom* and *Johnson*, *the jury must be clearly instructed as to the nature and extent of the presumption and that it does not shift the burden of proof to the defendant.*

233 Kan. at 985-6 (emphasis supplied).

It is clear that the final sentence of P.I.K. 2d Crim. 54.01, which was omitted from intruction No. 6, was crucial to the constitutionality of that instruction since it is the sentence which clearly indicates that the instruction does not shift the burden of proof to the defendant. This much was acknowledged by the Kansas Supreme Court in the instant case:

> **While the instruction at issue in the instant case adequately conveyed the nature and extent of the presumption, it did not specifically instruct the jury that the burden of proof never shifts to the defendant.**

Appendix A.

The petitioner goes further and urges that even the nature and extent of the presumption was not clear due to the second paragraph of the instruction given by the trial court. A jury reasonably could have believed that if they found the Defendant not to have been in the "throes of an epileptic seizure", not

only would the burden shift to the Defendant to disprove intent, but the presumption would become conclusive. In other words, a jury could reasonably have believed that the applicability of the presumption rested only with a determination of whether the Defendant was suffering an epileptic seizure. This is due to the use of the word "intentional" in the first paragraph and the use of the words "unintentional and involuntary" in the second. The use of these words in the same instruction on the presumption of intent could clearly have led the jury to believe that if the Defendant was not in the "throes of an epileptic seizure" then he acted intentionally. This would have led to the jury's ignoring other evidence of intent, particularly the psychological evidence.

Despite the fact that the Kansas Supreme Court found the instruction erroneous, the judgment was affirmed on the basis of harmless error. However, the standard for harmless error where the error is of constitutional dimensions was set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967):

> ". . .before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

386 U.S. at 24, 87 S.Ct. at 828.

That court has not declared its belief that the above errors were harmless beyond a reasonable doubt, nor, it is urged, could such a declaration have been properly made under the above circumstances. It is sufficient to require reversal that a reasonable juror *may* have been misled by the instruction. As stated by this Court in *Connecticut v. Johnson*, *supra*:

> In *Sandstrom* the jury was instructed that 'the law presumes that a person intends the ordinary consequences of his voluntary acts.' 442 U.S., at 512, 99 S.Ct., at 2453. *We held that instruction unconstitutional because a reasonable juror might have viewed it as creating a conclusive or*

> *burden-shifting presumption on intent.* Rather than evaluating the evidence to determine if the State had overcome the presumption of innocence and proved beyond a reasonable doubt that the defendant had intended to kill, *the jurors might have believed that, upon finding certain preliminary facts, "they were directed to find against defendant on the element of intent." Id.*, at 523, 99 S.Ct., at 2459.

460 U.S. at 84, 103 S.Ct. at 976 (emphasis added).

Likewise, in the instant case, a reasonable juror might have so concluded, absent the sentence set forth in the pattern instruction, "This burden never shifts to the defendant." And the risk is especially great since the epilepsy instruction was appended to the presumption instruction. It cannot be said that a reasonable juror could not have interpreted this defective instruction to mean, among other things, that a finding that Defendant was not suffering an epileptic seizure either required a finding against the Defendant on intent or shifted the burden to the Defendant on that issue. Footnote 13 in *Connecticut v. Johnson* is instructive in this regard:

> "The pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." [Citation omitted].

460 U.S. at 85, 103 S.Ct. at 977 (emphasis in original).

It is, therefore, submitted that instruction No. 6 given by the trial court in this case fell below the standards established by this Court to protect the petitioner's Fourteenth Amendment rights and the decision below of the Kansas Supreme Court is in conflict with the decisions of this Court in *Sandstrom* and *Johnson*.

(C) The question of whether the defendant was denied equal protection, due process of law and a fair trial by the Kansas Supreme Court's refusal to remand where defendant's defense of diminished capacity was not specifically or fairly presented in the trial court's instructions to the jury is an important question of federal law which has not been, but should be, settled by this Court.

Prior to the instant case, the Kansas Supreme Court had expressed its disapproval of the doctrine of diminished capacity while, at the same time, expressing its approval of the admission at trial of evidence of mental disease or defect for the purpose of negating a specific intent. See *State v. Dargatz*, 228 Kan. 322, 614 P.2d 430 (1980). That court also had specifically rejected a jury instruction on diminished capacity. See *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982). In this case, the Kansas Supreme Court acknowledged that its express disapproval of the doctrine was erroneous. It further departed from its flat denial of a jury instruction, leaving it to the discretion of the trial court as to whether the instruction should be given. See Appendix A. However, the court refused to reverse the petitioner's conviction and remand the case for a new trial.

The petitioner contends this caused a denial of his right to equal protection of the laws and his due process right to a fair trial under the Fourteenth Amendment.

First, Kansas appellate courts have in the past consistently required reversal of conviction where defendants were denied jury instructions which would have fairly stated the theory of the defense if there were evidence to support such a theory. See, e.g., *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980) (failure to give voluntary intoxication instruction where specific intent is element of crime charged, reversible error); *State v. Osburn*, 211 P.2d 248, 505 P.2d 742

(1973) (failure to give "procuring agent" instruction in drug sale prosecution, reversible error); *State v. Neal*, 215 Kan. 737, 529 P.2d 114 (1974) (failure to give instruction defining "fleeting possession" in prosecution for possession of firearm after felony conviction, reversible error); *State v. Caldrone*, 202 Kan. 651, 451 P.2d 205 (1969) (failure to instruct on intent to use burglary tools, reversible error); *State v. Werner*, 8 Kan.App.2d 364, 657 P.2d 1136 (1983) (failure to instruct that specific intent to sell is essential element of crime of offering controlled substance for sale held reversible error); *State v. Turnstall*, 8 Kan.App.2d 76, 651 P.2d 19 (1982) (failure to instruct on lesser included offense, reversible error); *State v. Whitehead*, 226 Kan. 719, 602 P.2d 1263 (1979) (failure to give limiting instruction on "other crimes" evidence, reversible error). No reason is given by the court below as to why that tradition has been ignored in this case.

Second, although the Kansas Supreme Court begrudgingly approves, in the trial court's discretion, a diminished capacity instruction which, in itself, is a denial of equal protection when a voluntarily intoxicated defendant is guaranteed a similar instruction, the trial court in the instant case was plainly prohibited from exercising its discretion in this case by previous holdings of the Kansas Supreme Court. Such a result is clearly unfair, unreasonable and constitutes a denial of the petitioner's due process right to a fair trial before a properly instructed jury.

Finally, the combination of instructions given by the trial court in the instant case did not, contrary to the assertions of the Kansas Supreme Court, adequately instruct the jury. Initially, there was the confusion surrounding the "presumption of intent" instruction discussed above. Beyond that, the case involved much complex psychological testimony, the insanity defense and, as argued on appeal in this case, the partial defense of diminished capacity. The instructions given by the trial court are probably the only legal training the jury is given

in order to apply the law to the facts of the case. The members of a jury do not have the benefit of years of graduate-level education and practice at the bar or on the bench. If they are instructed as to some of the uses to which they may put expert psychological testimony, but not all of those uses, they may simply overlook those other uses, or assume that those uses are improper. Here, the jury was instructed as to the use of such testimony on the issue of insanity but not as to the effect of such testimony on specific intent elements of the crimes charged. For years the diminished capacity doctrine has been misunderstood by the legal profession in Kansas. Surely it cannot be assumed that a legally unskilled juror who has never heard of the doctrine, will somehow be capable of correctly applying it without even being instructed that the doctrine exists. The potential for error by the legally unskilled jury is apparent. Just as clear is the potential prejudice to the defendant who has been denied a fair trial by the procedural treatment of this case afforded by the Kansas Supreme Court.

CONCLUSION

For the reasons set forth above, the petitioner respectfully submits that the jury was improperly instructed by the trial court in violation of the petitioner's Fourteenth Amendment rights to due process and equal protection of the laws. The petitioner went before the courts below and comes before this Court seeking only a fair trial before a properly instructed jury. He is entitled to no less. Petitioner prays that this Court issue a writ of certiorari to review the judgment and opinion of the Kansas Supreme Court.

Respectfully submitted,

DANIEL E. MONNAT, Counsel for Petitioner
MONNAT & SPURRIER
321 E. William, Suite 503
Wichita, Kansas 67203

APPENDIX A

NO. 57,973

STATE OF KANSAS
Appellee,

v.

JOEL D. JACKSON
Appellant.

SYLLABUS BY THE COURT

1.

Evidence of a defendant's diminished capacity to commit a crime is admissible to negate specific intent but not to remove criminal responsibility.

2.

When the defense of insanity is relied upon, the jury must consider the insanity issue prior to considering evidence of diminished capacity. If the jury finds the defendant sane, it can then consider evidence of diminished capacity as a defense to a crime requiring proof of a specific intent.

3.

When the issue of the sufficiency of the evidence to support a conviction is raised, the standard of review on appeal is whether the evidence, when viewed in a light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

4.

In order to remove the issue of insanity from a jury's consideration on the basis of the evidence, reasonable persons must necessarily possess a reasonable doubt as to the defen-

dant's sanity and must conclude that the government has failed to sustain its burden of proving beyond a reasonable doubt that the accused had the capacity to commit the crime.

5.

Although expert medical testimony is unanimous that an accused was legally insane at the time of the act, such testimony is not conclusive simply because it is not disputed by other medical testimony. In addition to expert testimony, the jury can consider the testimony of non-expert witnesses who observed the accused's actions before, during and after the crime.

Appeal from Sedgwick district court, DAVID W. KENNEDY, judge. Opinion filed February 21, 1986. Affirmed.

Daniel E. Monnat, of Fisher & Monnat, of Wichita, argued the cause and *Stanley Spurrier, III,* and *Orval L. Fisher,* of the same firm, were with him on the brief for appellant.

Geary N. Gorup, assistant district attorney, argued the cause, and *Robert T. Stephan,* attorney general, and *Clark V. Owens,* district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

HERD, J.: This is a criminal action. Joel D. Jackson was convicted by a jury of attempted first-degree murder (K.S.A. 1984 Supp. 21-3301 and K.S.A. 21-3401) and aggravated kidnapping (K.S.A. 21-3421).

Joel Jackson rented stalls at Sunflower Farms where he boarded horses owned by himself and his mother. The victim, Denise Picard, was employed as a horse trainer at Sunflower Farms. Her duties included feeding, grooming and training the owners' horses and cleaning stalls. At the time of the incident, Denise lived in a one-room apartment built inside the barn.

Prior to the incident which resulted in appellant's conviction, a number of antagonistic exchanges had taken place between him and the victim which resulted in the victim's being afraid of him.

Jackson continually criticized Denise's work, telling her she wasn't doing things properly and that if she couldn't handle the job, she should quit. Denise's fear of appellant and his harassment drove her to tears on many occasions. Frequently Jackson would ask Denise's supervisor, Fred Oden, to fire Denise and to hire him. He was told by Mr. Oden that Denise was progressing fine in her work and he was not ready to hire anyone else. By early April of 1984, appellant's dislike for Denise had taken on a more menacing tone, when he told Mr. Oden, "Denise better not never mess with me because if she do, I'll cut her up." Mr. Oden told appellant that if he was going to talk like that, he should load up his horses and leave.

On the morning of April 20, 1984, Joel Jackson drove to Sunflower Farms, where Denise was helping the owners of a sick horse. Jackson told Denise his mother was bringing two more horses out that day and he was going to bring out a stud as well. Denise told him he would have to wait until the following Monday because there was no additional room in the stables. She also explained she couldn't put a stud with the other horses or the horses would fight. They argued over this matter for a few minutes until appellant finally gave up and walked away.

Jackson's story differed from that of Denise. He testified that after arriving at Sunflower Farms, he began checking horses in various stalls. He claimed Mr. Oden had asked him to keep an eye on things while he was away. Mr. Oden and the owners of Sunflower Farms were at a horse show in St. Louis at the time of the incident. He further testified Denise asked him to look at a sick horse and after a conversation about the horse, some new boarders arrived at the barn. He said he left shortly thereafter, and he and Denise did not argue that morning.

After leaving Sunflower Farms, Jackson went to work at the China Inn restaurant in Wichita. While he was cutting vegetables at work that morning, he asked his boss, Bill Mar, to sharpen a knife. The knife had a plastic handle and a six-inch blade. Mr. Mar noticed the following day that a knife similar to the one that he had sharpened for Jackson the morning before was now missing. A knife of the same type was used in the attack on Denise.

After working through the noon hour, appellant received permission from Mr. Mar to leave. He was scheduled to return to work at 5:00 that evening. Before he left the China Inn, Mr. Mar asked him to pick up some supplies for the restaurant and gave him $150 with which to purchase them. Appellant picked up the supplies and then drove back out to Sunflower Farms.

According to Denise, Joel Jackson returned to Sunflower Farms at about 2:40 p.m. that afternoon. Denise was there alone at the time. She was hand-spreading straw in the stalls when she saw appellant's car back up to the west entrance of the barn. After about five minutes, appellant came into the barn and began looking into the stalls. Denise asked him if he was still waiting for his mother to bring out the horses, but he did not respond. Denise then started for the hallway leading to the west exit from the barn. Appellant followed her.

When she reached the pop machine in the hallway, appellant reached out and grabbed her hair with his left hand. He pulled a plastic-handled knife with a five- or six-inch blade from inside his coat, and cut the right side of her throat. Denise fell to her knees while Jackson continued to stab her throat and the right side of her head. She attempted to block the knife with her hands, resulting in numerous cuts to her hands. Appellant then began to pull and drag Denise towards the west exit. When they were within two feet from the door, he threw the knife back inside the barn, reached in his right-hand pocket and got out his car keys, all the while still holding on to

Denise's hair. Upon reaching the doorway, he opened the trunk of his car and attempted to push Denise into the trunk. Her resistance was strong however, and he was able to get only her right hand and her head into the trunk.

Appellant then pulled Denise back inside the barn, pushed her down, took off his coat and threw it in the middle of the hallway. He retrieved the knife and began stabbing her again, five or six times. Denise was able to break away from her assailant momentarily, but he got hold of her again and pleaded with her to get into the trunk of his car.

After again unsuccessfully attempting to get Denise into the trunk, he slammed the trunk lid on her head three or four times. By grabbing his leg, Denise was able to get entirely out of the trunk so that it slammed shut. She then grabbed the keys from the trunk and threw them. Appellant released her to retrieve his keys and she was thus able to run across the porch and down the road. She ran behind a wire fence for protection until his car went by her. She then ran back to the barn and drove to the closest business for help.

Jackson's version of these events is essentially that Denise made sexual overtures to him which he spurned, prompting Denise to hit him in the back with a pitch fork. He then claims he "blacked out" and the next thing he remembers is he was standing next to Denise at the pop machine and observed that she was bleeding. He claims she then started yelling and screaming and ran out the front door of the barn. He says he followed her a short distance but could not catch her so he got into his car and left "very fast."

Jackson drove to his mother's home in El Dorado and, upon arriving there, told his mother he had been in a "terrible fight." He then called a friend in California, who advised him to contact an attorney. He called attorney Jim Hargrove, and with his attorney's help, surrendered himself at the Butler County sheriff's department that evening.

Jackson was charged with aggravated kidnapping, attempted first-degree murder, and aggravated battery. The aggravated battery charge was later dismissed upon motion of the State.

At trial, Jackson presented an insanity defense. The jury found him guilty of aggravated kidnapping and attempted first-degree murder. After reviewing a report of appellant's examination and evaluation at Larned State Security Hospital, the trial judge sentenced him to fifteen years to life for attempted first-degree murder and to life imprisonment on the charge of aggravated kidnapping, with sentences to run consecutively. This appeal followed.

The appellant first claims error in the trial court's failure to give a jury instruction on the defense of diminished capacity. The appellant argues the doctrine of diminished capacity is recognized and applied in Kansas despite statements to the contrary in a number of opinions by this court.

Appellant's argument centers on our holding in *State v. Dargatz,* 228 Kan. 322, 614 P.2d 430 (1980). In *Dargatz,* we specifically rejected the doctrine of diminished capacity. However, we also stated:

> "Although a mental illness or defect not amounting to legal insanity is not a defense, since, for purposes of the capacity to commit crime, degrees of mental abnormality are not recognized, where the crime charged requires a specific intent, evidence of a mental defect which negates the specific intent is admissible." p. 332.

Appellant argues that by allowing evidence of a mental defect which negates specific intent, we have, in effect, adopted the doctrine of diminished capacity. This statement is true. However, under our rule, diminished capacity may be used only to negate specific intent, not to remove criminal responsibility. Appellant goes on to argue that under such cir-

cumstance the jury should have been instructed that evidence of mental disease or defect not amounting to legal insanity may be considered in deciding whether the defendant formed the specific intent necessary for the crimes charged.

We rejected the argument for such instruction in *State v. Grauerholz*, 232 Kan. 221, 654 P.2d 395 (1982). There, we reaffirmed *Dargatz*, noting that while *evidence* of mental defects is admissible, an *instruction* on diminished capacity was not proper since we have not adopted the defense of diminished capacity. Similarily, in *State v. Topham*, 231 Kan. 167, 170, 642 P.2d 986 (1982), we held that since we have rejected the doctrine of diminished capacity, the defendant was not entitled to an instruction permitting the jury to consider whether the defendant, although legally sane, was deprived of the mental ability to form the requisite specific intent. Thus, instructions on lesser included offenses were not required.

In addition to *Topham* and *Grauerholz*, we have recently reiterated our holding in *Dargatz* in *State v. Wood*, 235 Kan. 915, 686 P.2d 128 (1984).

Our statements in the foregoing cases are misleading: we reject the doctrine of diminished capacity yet permit the admission of evidence of diminished capacity in specific intent crimes. The admission of such evidence for the limited purpose of a partial defense against the specific intent of the crime is the doctrine of diminished capacity or — as designated in many jurisdictions — diminished or partial responsibility. In Lewing, *Psychiatric Evidence In Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 Syracuse L. Rev. 1051, 1060 (1976), Professor Travis Lewin discussed the scope of the partial responsibility defense:

> "Partial responsibility is a defense only in specific intent cases. Specific intent crimes are those in which, as one of the essential elements of the offense, the prosecution must

prove beyond a reasonable doubt that the defendant entertained a specific objective or engaged in certain specified mental activity. Examples of specific intent crimes range from aggravated homicides requiring proof of premeditation, deliberation and a design to effect death, through larceny offenses which require proof that the defendant intended to permanently deprive an owner of personalty of his right to possession, to conspiracy, attempted crimes and all offenses based upon accessorial liability. If for any reason the defendant did not entertain the particular mental state, then he did not commit that crime, although he may, of course, have committed some other or lesser crime not requiring that particular state of mind."

Thus, it is apparent we have adopted the doctrine of diminished capacity in spite of our past disclaimers. Evidence of diminished capacity is admissible only for the limited purpose of negating specific intent and is not a substitute for a plea of insanity. Where insanity is relied upon, the jury must first determine that issue. If it finds the defendant sane, it may then consider, where appropriate, evidence of diminished capacity as a defense to a crime requiring proof of a specific intent. Whether the jury should be instructed on diminished capacity is left to the sound discretion of the trial court. Here the court gave PIK instructions on intent, lesser included offenses and epilepsy. We consider the instructions in this case adequate to apprise the jury of appellant's case. We find no error.

Appellant next contents the trial court's refusal to instruct the jury on the defense of diminished capacity constituted a denial of equal protection in light of the fact that a jury instruction is allowed upon the partial defense of voluntary intoxication.

K.S.A. 21-3208(2) provides that evidence of voluntary intoxication may be considered when a specific intent or state of mind is a necessary element to constitute a particular crime.

Thus, we have held that where the crime charged requires a specific intent, voluntary intoxication may be a defense and instruction thereon is required where there is evidence to support such a defense. *State v. Sterling*, 235 Kan. 526, 529-30, 680 P.2d 301 (1984).

The fact that we have required an instruction on voluntary intoxication is merely a response to the legislature's enactment of K.S.A. 21-3208(2) and an attempt to carry out the purpose of the statute. As we have already determined, the trial court's failure to give an instruction on diminished capacity was not prejudicial since this theory was adequately covered by general instructions given by the trial court. This issue is without merit.

Appellant next contends the evidence was insufficient to support a conviction of attempted first-degree murder.

The crime of attempted first-degree murder requires proof that the defendant acted "maliciously, willfully, deliberately and with premeditation." K.S.A. 21-3401. Appellant argues there was insufficient evidence to establish premeditation, deliberation and intent to kill in the instant case.

When the issue of the sufficiency of the evidence to support a conviction is raised, the standard of review on appeal is whether the evidence, when viewed in a light most favorable to the prosecution, convinces the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. The appellate court looks only to the evidence in favor of the verdict to determine if the essential elements of the charge are sustained. *State v. Zuniga*, 237 Kan. 788, 794, 703 P.2d 805 (1985).

The evidence presented at trial demonstrated there had been animosity between the appellant and the victim for some time prior to the attack, due in part because the victim had a job which the appellant desired. The appellant had harassed the

victim on a number of occasions and the victim's supervisor had witnessed this harassment. Not long before the attack, the appellant had threatened the victim, telling her supervisor he would "cut her (the victim) up" if she caused him any trouble.

The appellant was aware the victim would probably be alone the day of the attack, since he knew that her supervisor and the owners of Sunflower Farms were in St. Louis that day. On the morning of the attack, the appellant had asked his employer to sharpen a knife for him. His employer noticed the next day that a knife similar to the one he had sharpened for appellant was missing. A knife of that same type was used in the attack on the victim.

The victim was slashed and stabbed repeatedly with the knife. The evidence indicated that upon arriving at Sunflower Farms that afternoon, appellant had backed up his car to the door of the barn. He later attempted repeatedly to force the victim into the trunk.

Although the appellant testified that prior to his "black-out," he remembered the victim stabbing him with the pitch-fork, the appellant bore no bruises, scratches or other indications of an attack on his person.

A review of the evidence makes it clear a rational fact-finder could have found the appellant guilty of attempted first-degree murder beyond a reasonable doubt and the evidence was sufficient to support the jury's verdict.

The appellant next argues the evidence was insufficient to establish the independent crime of aggravated kidnapping. The appellant makes three separate arguments relating to this issue: (1) The appellant lacked sufficient control over the victim for there to be a taking or confinement, (2) the appellant lacked sufficient intent, (3) the acts upon which the aggravated kidnapping charge was based occurred during a prolonged struggle between the victim and the appellant and were merely incidental to the charge of attempted murder.

The aggravated kidnapping charge arose out of the victim's testimony that the appellant twice attempted to push her into the trunk of his car.

The appellant first argues he failed to exert sufficient control over the victim for there to be a "taking or confining" as required by the kidnapping statute, K.S.A. 21-3420. While it is true the appellant was not successful in getting the victim locked inside his trunk, such control is not necessary.

In *State v. Mahlandt*, 231 Kan. 665, 647 P.2d 1307 (1982), the defendant was convicted of robbery and aggravated kidnapping arising out of two separate convenience store incidents. After robbing the first store, the defendant forced the female cashier to leave the store. She put up a struggle and he hit her in the face and head several times. The defendant placed the victim in his car, but she was able to escape.

As in the instant case, the defendant in *Mahlandt* argued his actions constituted only attempted kidnapping, since his victim escaped. We held as follows:

> "The issue here turns on the degree of asportation required to constitute a 'taking' under the statute. In *State v. Buggs*, 219 Kan. 203, 214, 547 P.2d 720 (1976), this court construed the statute as requiring no particular distance of removal, nor any particular time or place of confinement. Rather, it is the fact and not the distance of the taking that supplies the necessary element of kidnapping.
>
> "Here the evidence was sufficient to establish an actual taking of the victim. Either the defendant was guilty of kidnapping under the statute or he was not guilty, depending on the jury's belief of the evidence. There was no evidence of an attempt to kidnap.
>
> "The uncontroverted evidence here shows that the victim was forced from the store despite her attempt to fight and get away, and was physically placed by the de-

fendant in his car. It was only after the defendant went around to the other side of his car to get in, and started up the car to drive away that the victim was able to escape. Once the defendant secured the victim in his car it is clear that she was under his control and a taking had occurred." 231 Kan. at 671.

Appellant here argues our holding in *Mahlandt* requires the defendant to have completely secured the victim in his car in order for a "taking" to have occurred. We do not agree.

The facts of the instant case are similar to those in *State v. Royal*, 234 Kan. 218, 670 P.2d 1337 (1983). There, the defendant was convicted of aggravated burglary, aggravated battery and aggravated kidnapping, arising out of two separate incidents. In the second incident, the defendant approached the victim while she was in the parking lot of her apartment building, standing next to her car. He grabbed her around the neck, held a knife to her throat, and dragged her to his car. She fell down and briefly lost consciousness. While the defendant was placing her in his car from the driver's side, she regained consciousness, resisted and escaped. As in *Mahlandt*, the defendant argued the trial court should have instructed on attempted kidnapping. We held:

"Here, the taking or confinement is alleged to have been done to facilitate the commission of the crime of aggravated battery or rape. Ms. Harper was dragged a distance of some forty feet from her car across the parking lot to the defendant's vehicle. She explained that she fell down and evidently was knocked out; when she regained consciousness, the door on the driver's side of the defendant's car had been opened, and 'he had me past the open door and was pushing me into the car, into the driver's side of the car.' The defendant had the victim entirely under his control. He removed her from a well-lighted public place into the interior of his vehicle. That she kept fighting and scream-

ing, and eventually was able to break away, does not lessen the offense." *State v. Royal*, 234 Kan. at 223-24.

The key factor in both *Mahlandt* and *Royal* was not that the victim was pushed completely inside the car. Rather, the court emphasized the defendant's *control* over the victim.

The victim in the instant case was twice dragged by the appellant from inside the stables to the appellant's car, which was backed up to the door outside. While the appellant was not successful in getting her completely inside the trunk, it is clear she was under his control. The fact that the victim was able to escape does not prevent the appellant's conviction for aggravated kidnapping.

The appellant also maintains the evidence was insufficient to show he acted with the intent "to facilitate flight or the commission of any crime" or "to inflict bodily injury" on the victim, as required by K.S.A. 21-3420.

Specifically, appellant points to the fact that he and the victim were already in a secluded place, and appellant knew the owners and trainer were out of town. He argues that forcing the victim from the barn to his car could only have increased his risk of detection. Thus, the appellant argues his forcing of the victim from the barn to the car could not have been done with the intent to facilitate the commission of a crime.

Applying the standard of review earlier set out, we find the evidence was sufficient to find the appellant intended to either inflict further bodily injury on the victim or to facilitate the commission of his crime by hiding the victim's body and fleeing.

Appellant next contends under this issue that there was a continuous and extended struggle giving rise to the charge of attempted murder. Thus, he argues the acts allegedly constituting kidnapping were merely incidental to the former

charge and did not have as their purpose the facilitation of the commission of a crime.

The appellant relies on *State v. Buggs*, 219 Kan. 203, 216, 547 P.2d 720 (1976). In *Buggs*, we discussed the difference between a taking to facilitate the commission of a crime and a taking which is merely incidental to the main crime. We held:

> "[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> "(a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> "(b) Must not be of the kind inherent in the nature of the other crime; and
>
> "(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." p. 216.

Applying the factors set out in *Buggs*, we find the conduct of the appellant here constituted an independent crime of aggravated kidnapping. The action of the appellant in attempting to force the victim into the trunk was clearly done to facilitate the commission of a crime. Had he succeeded in forcing the victim into the trunk, the appellant would have substantially lessened the risk of detection. In addition, his actions in shoving her out of the barn and trying to push her into the trunk were not of the kind inherent in the nature of attempted first-degree murder. Thus, the evidence presented was sufficient to establish the separate crime of aggravated kidnapping.

As a final point under this issue, the appellant argues the trial court erred in failing to instruct upon the offense of attempted kidnapping.

"Attempt" is defined at K.S.A. 1984 Supp. 21-3301(a) as follows:

> "An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."

As we previously stated, the evidence presented at trial was sufficient to establish the completed crime of aggravated kidnapping. Therefore, the trial court's failure to give an instruction on attempted kidnapping was not error.

Appellant next argues the trial court erred in not finding him to be insane as a matter of law under the *M'Naghten* test of insanity.

Much of the trial of this case was taken up with the testimony of psychological experts relating to the appellant's mental condition. Dr. Moeller, a clinical psychologist, was initially contacted by the State to evaluate the defendant, but after the State declined to call him as a witness, he testified for the defense. Dr. Moeller testified that the appellant was a "very impaired individual." He described the appellant as having a borderline personality, a condition under which a person with enough emotion and stress "can become disoriented to the place where he . . . does not know right from wrong, reality from fantasy." Dr. Moeller also testified he did not believe the appellant knew right from wrong at the time of the attack.

Dr. Thomas Thorp, also a clinical psychologist, testified that the appellant suffered from a personality disorder, was very prone to anxiety and sensitive to stress, and that it was not unusual for persons with the appellant's psychological problems "to lose awareness of their actions for certain periods of time." Dr. Thorp did not believe the appellant knew right from wrong at the moment of the crime.

Dr. Leslie Ruthven, a clinical psychologist, also testified at trial regarding the results of tests he performed on the appellant. Dr. Ruthven testified the appellant exhibited some symptoms of temporal lobe epilepsy, but his testing was unable to negate or confirm the existence of that defect. Dr. Ruthven concluded from his testing the appellant suffered from brain damage which had been in existence for a very long time, and that this brain damage prevented the full development of his intellectual academic skills and higher level ability. Dr. Ruthven did not testify as to whether the defendant knew right from wrong at the time of the crime.

Since the only experts who testified regarding the issue of legal insanity were both of the opinion that the appellant was legally insane at the time of the incident, appellant argues the trial court should have found him insane as a matter of law.

The test for taking the issue of insanity away from the jury was adopted by this court in *State v. Chase*, 206 Kan. 352, 362, 480 P.2d 62 (1971), and reiterated in *State v. Sanders*, 225 Kan. 147, 151, 587 P.2d 893 (1978). There, we held that in order to remove the case from the jury's consideration on the basis of the evidence, reasonable persons must necessarily possess a reasonable doubt as to the defendant's sanity and must conclude that the government has failed to sustain its burden of proving beyond a reasonable doubt that the accused had the capacity to commit the crime.

In *Sanders*, we held that even though medical experts are unanimous in their diagnosis of the defendant, such testimony is not conclusive simply because it is not disputed by other medical testimony. *State v. Sanders*, 225 Kan. at 153. In addition to expert testimony, the jury is free to consider the testimony of non-expert witnesses who observed the accused's actions before, during and after the crime. *State v. Sanders*, 225 Kan. at 153, *State v. Sagebiel*, 206 Kan. 482, 489, 480 P.2d 44 (1971). Additionally, in *In re Jones*, 228 Kan. 90, 99, 612 P.2d

1211 (1980), we noted that evidence a defendant attempted to conceal the crime or his identity as the perpetrator thereof goes a long way to defeat an insanity defense.

In the present case, the appellant was aware no one was at Sunflower Farms the day of the attack except the victim. He attempted to conceal his crime by trying to force the victim into the trunk of his car. Additionally, there was evidence the appellant tried to run over the victim as he fled from the scene of the crime.

We have held it is a rare occasion when the insanity issue should be taken from the jury. *State v. Sanders,* 225 Kan. 147, 151. This is not such a case. The State sustained its burden of proof with respect to the issue of the appellant's sanity and the question was properly sent to the jury.

The appellant's final contention on appeal is that the trial court erred in giving a modified version of the "presumption of intent" instruction, PIK Crim. 2d 54.01. The instruction in question read as follows:

> "Ordinarily a person intends all the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the defendant.
>
> "If you find that Mr. Jackson was in the throes of an epileptic seizure at the precise time of the commission of the crimes and that the seizure rendered his actions unintentional and involuntary, you must find him not guilty of all charges and their lesser included offenses."

The first paragraph of the instruction is a modified version of PIK Crim. 2d 54.01. That instruction provides:

"Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant."

The obvious difference between the instruction given and the PIK instruction, and the difference about which the appellant complains, is the failure of the trial court to instruct the jury that the burden never shifts to the defendant, as is stated in the last sentence of the PIK instruction.

The second paragraph of the instruction was added as a result of testimony that the appellant may suffer from temporal lobe epilepsy.

In *State v. Robinson, Lloyd & Clark,* 229 Kan. 301, 624 P.2d 964 (1981), we discussed the history of PIK Crim. 2d 54.01 and its predecessor. We noted that the revised presumption met the requirements of *Sandstrom v. Montana,* 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). In *Sandstrom,* the court held that the instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violated the requirement that the State prove every element of a crime beyond a reasonable doubt. The court reasoned that this instruction might be interpreted by the jury as creating either a conclusive presumption or a burden-shifting presumption. 442 U.S. at 524.

Thus, in *State v. Robinson, Lloyd & Clark,* we held that the revised instruction (PIK Crim. 2d 54.01) clearly establishes only a permissive inference and does not create a burden-shifting presumption in violation of *Sandstrom.*

We reiterated the *Sandstrom* requirements in *State v. Johnson,* 233 Kan. 981, 666 P.2d 706 (1983), holding that:

"It has long been recognized that any instruction which shifts the burden of proof or of persuasion to the defendant is unconstitutional and is clearly erroneous. It appears that under *Sandstrom* any instruction which might reasonably be construed by the jury as shifting the burden of proof to the defendant is also unconstitutional." p. 985.

We further held in *Johnson:*

"[U]nder the pronouncements of *Sandstrom* and *Johnson*, the jury must be clearly instructed as to the nature and extent of the presumption and that it does not shift the burden of proof to the defendant. Any instruction which may reasonably lead the jury to believe that a presumption is conclusive or that the burden to disprove an element of the crime rests with the defendant is unconstitutional." 223 Kan. at 986.

While the instruction at issue in the instant case adequately conveyed the nature and extent of the presumption, it did not specifically instruct the jury that the burden of proof never shifts to the defendant.

The State concedes it would have been advisable to include the language in question, but argues any error in its omission is harmless. We agree. The jury instruction given here emphasized the State's burden to prove the required criminal intent. The instruction did not establish a conclusive presumption requiring the defendant to come forth with evidence of his mental state. Rather, it simply stated a permissive inference.

The judgment of the trial court is affirmed.

MILLER, J., concurring:

In *State v. Grauerholz*, 232 Kan. 221, 229, 654 P.2d 395 (1982), the defendant contended that the trial court should have given a special jury instruction on diminished capacity. We noted in our opinion that evidence of one's mental state is

admissible on the subject of intent, and that the defendant was permitted to introduce all of the evidence he wished, in order to show his mental capabilities. We concluded that a special instruction on diminished capacity need not be given and was properly rejected by the trial court.

In the case now before us, appellant argues that the jury should have been instructed on diminished capacity. We have concluded that the trial court did not err in refusing to give such an instruction. In this I agree. However, the majority has taken a new tack and states: "Whether the jury should be instructed on diminished capacity is left to the sound discretion of the trial court."

The doctrine of diminished capacity is discussed in 21 Am. Jur. 2d, Criminal Law § 41. Under the doctrine:

> "[W]here there is evidence of an abnormal mental condition tending to prove either that the accused could not or did not entertain the specific intent or state of mind essential to the offense, such evidence, though not sufficient in itself to establish legal insanity, should be considered for the purpose of determining whether the crime charged, or a lesser degree thereof, was in fact committed."

Evidence of the accused's mental condition may tend to show that he could not form the required intent. Evidence of his physical condition may tend to show that he was unable to perform certain acts charged. Evidence of his presence in some other location during the time that the crime was committed may tend to show that the defendant could not have been present at the crime scene. Each of these are evidentiary matters which a jury may properly consider; but, in my judgement, none of them should be the subject of specific jury instructions.

Jury instructions in a criminal case tell the jury what the State must prove and then tell the jury that it must consider and weigh all of the evidence to determine whether or not the

State has met its burden. An instruction on diminished capacity, it seems to me, would unduly emphasize certain evidence in the case. It is not the function of jury instructions to emphasize either party's evidence or to argue the case on behalf of either side. A special jury instruction on diminished capacity should not be given. I agree with the disposition of this case, but I disagree with the quoted language relating to jury instructions.

McFarland, J., joins the above concurring opinion.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,

v.

Joel D. Jackson, Appellant.

No. 85-57973-S

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

DENIED.

Yours very truly,
LEWIS C. CARTER
Clerk, Supreme Court

Date April 3, 1986

APPENDIX C

sgf
CARL L. WAGNER
Assistant District Attorney
Sedgwick County Courthouse
Wichita, Kansas 67203
268-7281

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT**

THE STATE OF KANSAS, Plaintiff,	)	Case No. 84CR655
vs.	)	
JOEL D. JACKSON, Defendant.	)	Division No. 4

C43366
9-12-63 (21)

JOURNAL ENTRY OF TRIAL

(Filed November 13, 1984)

On this 15th day of October, 1984, this case comes on for trial on the Complaint/Information charging the defendant with Attempted First Degree Murder, Count One, contrary to K.S.A. 21-3301 and Aggravated Kidnapping, Count Two, contrary to K.S.A. 21-3421. The State of Kansas appears by its attorney, Carl L. Wagner, Assistant District Attorney. The defendant appears in person and by his attorneys, Daniel E. Monnat and Orval L. Fisher.

Thereupon, a Jury is duly impaneled and sworn and evidence is presented from court day to court day until both sides rest.

The following witnesses were sworn and testified:

Brenda Reilly, Sedgwick County, Kansas
Denise Picard, Sedgwick County, Kansas
Jim Edwards, Sedgwick County, Kansas
Officer M.A. Keller, Sedgwick County, Kansas
Officer T.S. Spencer, Sedgwick County, Kansas
Detective Gary Henderson, Sedgwick County, Kansas
Judy Yee, Sedgwick County, Kansas
Bill Mar, Sedgwick County, Kansas
Detective Pat Cunningham, Sedgwick County, Kansas
Dr. Jim French, Sedgwick County, Kansas
William Taylor, Sedgwick County, Kansas
Cindy Life, Sedgwick County, Kansas
Detective Carl King, Sedgwick County, Kansas
Detective Larry Warehiem, Sedgwick County, Kansas
Kevin Pierce, Sedgwick County, Kansas
Jane Harris, Sedgwick County, Kansas
Fred Oden, Sedgwick County, Kansas
Mary Ayers, Sedgwick County, Kansas
Pat Glynn, Sedgwick County, Kansas
Joel Jackson, Sedgwick County, Kansas
Fran Simmons, Sedgwick County, Kansas
Lola Lee Jackson, Sedgwick County, Kansas
Anita Campbell, Sedgwick County, Kansas
Dr. Leslie Ruthvan, Sedgwick County, Kansas
Dr. Thomas Ruby, Sedgwick County, Kansas
Dr. Ted Mueller, Sedgwick County, Kansas
Dr. Thomas Thorp, Sedgwick County, Kansas
Woody Mitchell, Sedgwick County, Kansas
Pat Simmons, Sedgwick County, Kansas
Richard D. Olsson, Sedgwick County, Kansas
Sandra Ray, Sedgwick County, Kansas
Dr. Diliwar Abbas, Sedgwick County, Kansas

Thereupon, the Jury having received the evidence, the instructions of the Court, and the arguments of counsel, and having duly deliberated, returned the following verdicts in open Court:

"We, the Jury, impaneled and sworn in the above-entitled case, do upon our oaths, find Mr. Jackson:

COUNT ONE:

__X__ Guilty of attempt to commit first degree murder.
___ Guilty of attempt to commit second degree murder.
___ Guilty of attempt to commit voluntary manslaughter.
___ Not guilty by reason of insanity.
___ Not guilty.

(Check one)

* * * * * * * * * * * * *

COUNT TWO:

__X__ Guilty of aggravated kidnapping.
___ Not guilty by reason of insanity.
___ Not guilty.

(Check one)

10/25/84 — DATE

/s/ Donald J. Guthrie — FOREMAN

Thereupon, the Court accepted the verdicts. The Court then continues this case for motion for new trial and/or sentencing.

Thereafter, on the 29th day of October, 1984, the State of Kansas appears by its attorney, Carl L. Wagner, Assistant District Attorney. The defendant appears in person and by his attorney, Orval L. Fisher.

WHEREUPON, the Court finds the defendant is in need of further evaluation and the Court makes the following order, to-wit:

IT IS HEREBY ORDERED BY THE COURT that the defendant be and he is hereby committed to the custody of the Larned State Security Hospital, for not more than 100 days, for pre-sentence examination, evaluation and report to this Court, in writing, pursuant to K.S.A. 22-3429.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment to the Sheriff of Sedgwick County, Kansas or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and said Sheriff or authorized deputy is ordered to deliver the defendant, at their earliest convenience, to the custody of the Superintendent of the Larned State Security Hospital, Larned, Kansas, to carry out the said examination and evaluation as ordered by the Court, and make due return thereof.

IT IS SO ORDERED.

/s/ David W. Kennedy
DAVID W. KENNEDY, JUDGE

APPROVED BY:

/s/ Carl L. Wagner
CARL L. WAGNER
Assistant District Attorney

ORVAL L. FISHER
Attorney for Defendant

DANIEL E. MONNAT
Attorney for Defendant

APPENDIX D

scb
CARL WAGNER
Assistant District Attorney
Sedgwick County Courthouse
Wichita, Kansas 67203
268-7478

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT**

THE STATE OF KANSAS, Plaintiff, vs. JOEL D. JACKSON Defendant.	Case No. 84CR655 Division 4

C43166
9-12-63 (21)

JOURNAL ENTRY OF JUDGMENT
(Filed February 13, 1985)

On this 31st day of January, 1985, this case comes on for further hearing, the defendant having heretofore been returned from the custody of the Larned State Hospital. The State of Kansas appears by its attorney, Carl Wagner, Assistant District Attorney. The defendant appears in person and by his attorneys, Daniel E. Monnat and Orval L. Fisher. The defendant's motion for judgment of acquittal or in the alterna-

tive for a new trial are heard by the Court, who, after hearing the arguments of counsel and examining the records, overrules each motion.

The following witnesses were sworn and testified:

Dr. Theodore Moeller, Sedgwick County, Kansas
Dr. Thomas Thorp, Sedgwick County, Kansas

The Court inquires of the defendant if he has any legal cause to show why judgment of sentence should not be pronounced against him; the defendant failing to show any such cause and none appearing, there being none, the Court, having reviewed the report from Larned State Hospital and having reviewed the Pre-Sentence Investigative Report prepared by the Court's Services Officer, and being fully advised in the premises, then proceeds to pronounce judgment of sentence against the defendant.

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for imprisonment for a period of not less than fifteen (15) years to Life on the charge of Attempted First Degree Murder, Count One, contrary to K.S.A. 21-3301, and in accordance with K.S.A. 21-4501(b), and sentenced to Life on the charge of Aggravated Kidnapping, Count Two, contrary to K.S.A. 21-3421, and in accordance with K.S.A. 21-4501(a). Said sentences shall run consecutive to each other.

The defendant by and through his attorneys, makes oral application to the Court for probation from the confinement portion of the sentence which motion was by the Court denied.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment and commit-

ment to the Sheriff of Sedgwick County, Kansas or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and said Sheriff or authorized deputy is ordered to transport the defendant to the custody of the Secretary of Corrections for imprisonment and make due return thereof.

IT IS FURTHER ORDERED that for the purpose of computing defendant's sentence his parole eligibility and conditional release dates thereunder that such sentence shall be computed from: October 23, 1984.

IT IS SO ORDERED.

/s/ David W. Kennedy
DAVID W. KENNEDY, JUDGE

APPROVED BY:

/s/ Carl Wagner
CARL WAGNER
Assistant District Attorney

DANIEL E. MONNAT
Attorney for Defendant

ORVAL L. FISHER
Attorney for Defendant

APPENDIX E

INSTRUCTION NO. _____

A mental disease or defect not amounting to insanity, as defined in these instructions, is not a defense to a criminal charge, but when a particular intent or other state of mind is a necessary element of an offense charged, the mental disease or defect may be taken into consideration in determining whether the accused was capable of forming the necessary intent or state of mind.

With regard to the charge of attempted murder in the first degree, if you find the defendant was legally sane at the time the alleged offense was committed, but you have a reasonable doubt as to whether, because of a mental disease or defect not amounting to insanity, the defendant was capable of deliberating and premeditating the murder of Denise Picard, then you shall find the defendant not guilty of attempted murder in the first degree and you will pass on to the question of whether he is guilty of attempted voluntary manslaughter.

With respect to the aggravated kidnapping charge, if you find the defendant was legally sane at the time the alleged offense was committed but you have a reasonable doubt as to whether, because of a mental disease or defect not amounting to insanity, the defendant was capable of forming the intent required in paragraph 2 of Instruction No. _____, then you shall find the defendant not guilty of aggravated kidnapping.

APPENDIX F

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 84 CR 655
JOEL D. JACKSON Defendant.	)	

MOTION FOR NEW TRIAL

(Filed November 5, 1984)

COMES NOW the defendant, Joel D. Jackson, by and through his attorneys, Daniel E. Monnat and Orval L. Fisher of Fisher & Monnat, and moves the Court to set aside the verdict of guilty returned against him on October 25, 1984, and grant him a new trial, for the following reasons:

1. The trial court erred in its instructions to the jury; particularly, instruction #6 and #12.

2. The trial court erred in failing to give an instruction on diminished capacity as it relates to the specific intent elements in the crimes charged. Defendant asserts that the current policy of this State in failing to give such instruction in the case of mental defect or disease while giving an instruction on voluntary intoxication, which has the similar effect of negating a specific intent, denies the Defendant his rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

3. The trial court erred in failing to give Defendant's requested instruction containing the American Law Institute test of insanity.

4. The trial court erred in refusing to give Defendant's instruction on character evidence.

5. The Defendant was denied a fair trial by the prosecutors inflammatory statements and statements outside the evidence in closing argument.

FISHER & MONNAT

By: */s/ Daniel E. Monnat*
DANIEL E. MONNAT

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above Motion for New Trial was hand delivered this 5th day of November to Carl Wagner, Assistant District Attorney, Sedgwick County Courthouse, Annex, Wichita, Kansas, 67203.

/s/ Daniel E. Monnat
DANIEL E. MONNAT